

Revenue Ruling

Ruling Number	: PUB-DT-2016-2
Title	: Landholder provisions - Bare Trustees
Tax Line	: Duties
Legislative Reference	: Duties Act 2001
Previous Ruling	: Nil
Date of Ruling	: 6 December 2016

Preamble

The landholder provisions in Chapter 3 of the [Duties Act 2001](#) (the Act) charge duty on relevant acquisitions in landholders. A landholder is any company or unit trust scheme (whether private or public) that has land holdings in Tasmania with an unencumbered value of \$500 000 or more. A relevant acquisition in a landholder occurs where a person acquires an interest of 50 per cent or more in a private landholder (being a private company or private unit trust scheme) or 90 per cent or more in a public landholder (being a listed company or public unit trust scheme).

In determining the extent of a person's interest in a landholder for the purposes of the Act, the Act effectively looks through arrangements whereby shares or units in a landholder are held by one person on behalf of another. The Act does this by providing that any interest in a landholder that is acquired or held by a person (referred to as the 'legal owner') as bare trustee for another person is taken, for the purposes of the landholder provisions, to have been acquired or held by the ultimate beneficial owner of the interest in the landholder, rather than the legal owner.

This Ruling explains how the 'bare trustee' provisions operate and sets out the Commissioner's interpretation of the terms 'bare trustee' and 'bare trust'. The Ruling also provides some examples as to how the bare trustee provisions will be applied in peculiar circumstances.

Ruling

Section 74 of the Act provides that:

- if a person acquires or holds an interest in a landholder as bare trustee for another person, the other person is a 'beneficial owner' of that interest in the landholder;
- if a person who is a beneficial owner of an interest in a landholder holds that interest as bare trustee for another person, then that other person is also a 'beneficial owner' of that interest in the landholder; and
- the 'ultimate beneficial owner' of an interest in a landholder is any beneficial owner of the interest in the landholder who does not hold that interest as bare trustee for another person.

The ultimate beneficial owner is taken to have made the acquisition to the exclusion of the bare trustee(s) and is liable for the payment of duty in respect of any acquisition made in a landholder by the bare trustee(s).

Accordingly, if A acquires or holds an interest in a landholder as bare trustee for B (without any subtrust), then B is the ultimate beneficial owner of the interest. However, if B holds its interest as bare trustee for C, then C (rather than B) is the ultimate beneficial owner of the interest (and so on, if there are several layers of sub-trusts).

Section 75 of the Act provides that the ultimate beneficial owner of an interest acquired by the legal owner (eg the bare trustee) will be taken to own the relevant interest. Accordingly, where such an arrangement exists, the ultimate beneficial owner of an interest, rather than the legal owner, is required to lodge an acquisition statement and pay any landholder duty in respect of any relevant acquisition (as defined in Section 65) made by the legal owner (Section 75(2)).

Further, as the ultimate beneficial owner is taken to have acquired the relevant interest in their own right, Section 75(4) of the Act provides that the acquisition is to be aggregated with other interests held by the ultimate beneficial owner or an associated person of the ultimate beneficial owner of the interest, rather than with other interests held by the legal owner or associated persons of the legal owner. Accordingly, if A has a 40 per cent interest in a landholder in their own right and B, as bare trustee for A, acquires a further 10 per cent interest in the landholder, A will be taken to have made a relevant acquisition of a 50 per cent interest in the landholder and duty will be payable by A in respect of that acquisition.

Meanings of 'bare trustee' and 'bare trust'

Apart from confirming that a bare trustee includes a custodian (which would include a person holding property as nominee for another), Part 3 of Chapter 3 of the Act does not define the expressions 'bare trust' or 'bare trustee'.

Whilst the meaning of the expressions 'bare trust' and 'bare trustee' may vary according to the statutory context¹, typically a bare trust (also referred to as a passive trust) is one in which the trustee has no active duties to perform, by contrast with a trust in which there are active duties². However, as a matter of strict logic, there are few circumstances where a trustee does not have some active duties to perform. For example, a person who holds shares or units on trust for another person absolutely might have to exercise voting rights in respect of the shares or units (in accordance with the wishes of their beneficial owner), but this contingency would not preclude the characterisation of the holding as being that of a bare trust³.

The commonly accepted meaning of 'bare trust' is a trust under which the trustee holds property without any interest therein (other than that existing by reason of the office and the legal title as trustee) and without any duty to perform, except to convey the property upon demand to the beneficiary or beneficiaries or as directed by them, for example on sale to a third party⁴. The essential characteristic of a bare trust is that the trustee only acts at the direction of the beneficial owner in respect of any dealings with the trust property.

¹ *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271 at 283.

² *Corumo Holdings Pty Ltd & ors v C Itoh Ltd & ors* (1991) 24 NSWLR 370 at 398; *Thorpe v Bristle Ltd* (1996) 16 WAR 500 at 505.

³ *Dal Pont & Chalmers; Equity and Trusts in Australia* (4th edition,2007) at para [21.45] (pp.548-549).

⁴ *CGU Insurance Limited v One. Tel Limited (in liq)* [2010] HCA 26 at [36], *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271 at 283, *Dal Pont & Chalmers; Equity and Trusts in Australia* (4th edition,2007) at para [21.45] (pp.431, 548).

A bare trust will usually be an express trust (whether or not in writing) and it includes, but is not limited to, a trust arising under formal custodial arrangements⁵.

The term 'bare trustee' also encompasses the position occupied by a person holding title to property under a resulting trust arising from the provision by the beneficiary of the purchase money for the property⁶.

A person who operates a business as trustee for another person or persons cannot ordinarily be described as a bare trustee. However, this does not mean that a bare trustee cannot charge fees for its trustee services as part of an overall business of providing such services (as with a professional custodian company).

Transfer of significant interest in a landholder from trustee to custodian

If a significant interest in a landholder held by the trustee of a trust (not a bare trust) is transferred to a custodian for the trustee, a relevant acquisition will have been made under Section 65 of the Act and an acquisition statement will need to be lodged.

However, under the bare trust provisions, the transferor trustee, rather than the custodian, is taken to be the ultimate beneficial owner and to have made the acquisition. In these circumstances, noting that exemptions and concession that exist under Chapter 2 of the Act are replicated for the purposes of the landholder provisions (Sections 83 and 84A), the Commissioner would accept that there was no change in beneficial ownership associated with the transfer (for which an exemption exists in Section 49) on the basis that the person who is taken to have acquired the interest (ie the trustee) is the same person who disposed of the interest. As a result, no duty would be charged in connection with the acquisition by the custodian on behalf of the ultimate beneficial owner.

Alternately, the transfer in this example may also be eligible for the benefit of concessional duty under Section 37 (via Section 84A).

Transfer of significant interest in a landholder from a bare trustee to the ultimate beneficial owner

If a bare trustee transfers a significant interest in a landholder to the 'ultimate beneficial owner' of that interest, a relevant acquisition will have been made under Section 65 of the Act and an acquisition statement will need to be lodged. However, as with the prior example, this particular transfer would not be taken to effect a change in beneficial ownership of the property transferred for the purposes of Section 49 of the Act as the person who acquired the interest (the ultimate beneficial owner) is the same as the person who is taken to have disposed of the interest such that an exemption from duty would apply.

Alternately, the transfer in this example may also be eligible for concessional duty under Section 41 (via Section 84A) on the basis of being a transfer of trust property to a beneficiary.

⁵ In the case of custodial arrangements relating to interests in landholders, the custodian is the legal owner of the interest and the person for whom the custodian acts (which is usually the trustee of an existing trust) is the ultimate beneficial owner of the interest. Thus, for example, if an interest in a landholder is acquired in the name of a custodian for the trustee of a superannuation fund or a unit trust scheme (which would not normally be a bare trust) it is the trustee of the superannuation fund or the unit trust scheme (for whom the custodian holds the interest under a bare trust) who is deemed to acquire the interest under Section 75 of the Act.

⁶ *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271.

Explanation of Revenue Rulings

All rulings must be read in conjunction with [Revenue Ruling PUB-GEN-2014-5, Explanation and Status of Revenue Rulings](#).

For questions about this ruling, please email revenuereview@treasury.tas.gov.au or phone (03) 6166 4400.

A handwritten signature in black ink, appearing to read 'JC Root', with a horizontal line extending to the right.

JC Root
Commissioner of State Revenue
6 December 2016